MOTION FILED
JUN 1 1981

No. 80-689

In the

Supreme Court of the United States

October Term, 1980

Gary E. Widmar, et al., *Petitioners*

v.

Clark Vincent, et al., *Respondents*

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

Motion for leave to file brief Amicus Curiae and brief Amicus Curiae of Center for Constitutional Studies, National Council of Churches of Christ in the United States, National Institute for Campus Ministry, and United Ministries in Education, Amici Curiae, in Support of the Respondents

---

Of Counsel:
Kenneth F. Ripple
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2855

Attorney for Amici Curiae:
Edward McGlynn Gaffney
Associate Professor of Law
and Associate Director
Center for Constitutional Studies
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2786

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

MOTION FOR LEAVE TO FILE BRIEF x

BRIEF AMICUS CURIAE 1

I. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, CONSTITUTIONAL RIGHTS OF STUDENTS ATTENDING PUBLIC INSTITUTIONS OF HIGHER EDUCATION, AND OF CAMPUS MINISTERS SERVING THOSE STUDENTS, WILL BE IMPERMISSIBLY BURDENED 1

A. THE GROWTH OF THE STATE'S ROLE IN AMERICAN HIGHER EDUCATION REQUIRES THE STATES TO BE SENSITIVE TO A BROAD SPECTRUM OF HUMAN VALUES, INCLUDING VOLUNTARILY CHOSEN RELIGIOUS VALUES, WHENEVER THE STATES ATTEMPT TO REGULATE AND CONTROL THE EDUCATIONAL EXPERIENCE 1

B. THE REGULATIONS IN THE INSTANT CASE HAVE THE EFFECT OF REGULATING SPEECH AND ASSOCIATIONAL RIGHTS ON THE IMPERMISSIBLE BASIS OF THE RELIGIOUS CONTENT OF COMMUNICATION AND ASSOCIATION 11

C. THE REGULATIONS IN THE INSTANT CASE ARE NOT REQUIRED BY THE HISTORICAL INTENT OF THE NO-ESTABLISHMENT CLAUSE, NOR BY SUBSEQUENT INTERPRETATIONS OF THE MEANING OF THAT CLAUSE BY THIS COURT, NOR BY CONTEMPORARY PRACTICE IN MANY PUBLIC INSTITUTIONS OF HIGHER EDUCATION 15

II. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, FEDERAL REGULATION OF CHURCH-RELATED HIGHER EDUCATION MAY, IN IMPORTANT RESPECTS, REMAIN EXCESSIVELY RESTRICTIVE AND BURDENSOME 23

III. BY AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS, THIS COURT COULD CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER 25

CONCLUSION 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Cases cited: Page(s)

Abington School District v. Schempp,
374 U.S. 203 (1963) xi,1,6,21,26,27

Brandon v. Bd. of Ed.
635 F.2d 971 (2d Cir. 1980),
cert. pending, No. 80-1396 19

Buckley v. Valeo, 424 U.S. 1 (1976) 14

Calvary Presbyterian Bible Ch. v. Bd. of Regents,
72 Wash. 2d 912 (1967) 21

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11

Carey v. Brown, 447 U.S. 455 (1980) 12

Central Hudson Gas Co. v. Public Service Comm'n.,
447 U.S. 557 (1980) 15

Committee for Public Education
and Religious Liberty v. Regan,
444 U.S. 646 (1980) 25

Consolidated Edison Co. v. Public Service Comm'n.
447 U.S. 530 (1980) 15

Craig v. Boren, 429 U.S. 190 (1976) 12

Dittman v. Western Washington Univ.,
____ F. Supp. ____ (W.D. Wash. 1980) 21

Engel v. Vitale, 370 U.S. 421 (1962) xi,26,27

Everson v. Bd. of Ed., 330 U.S. 1 (1947) 18

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 14,15

Fowler v. Rhode Island, 345 U.S. 67 (1953) 11,13

Gay Lib v. University of Missouri,
558 F.2d 848 (8th Cir. 1977), cert. denied,
434 U.S. 1080, reh. denied,
435 U.S. 981 (1978) 12,14,28

Healy v. James, 408 U.S. 169 (1972) 14,19,28

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 14

Keegan v. University of Delaware,
349 A.2d 14 (Del. 1975), cert. denied,
424 U.S. 934 (1976) 21

Kunz v. New York, 334 U.S. 558 (1948) 13

McCollum v. Bd. of Ed., 333 U.S. 203 (1948) 27

McDaniel v. Paty, 435 U.S. 618 (1978) 1,12,13,20

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 11

NAACP v. Alabama, 357 U.S. 449 (1958) 12,14

Niemotko v. Maryland, 340 U.S. 268 (1951) 13

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir.),
application for injunction denied,
444 U.S. 890 (1979) 19

Police Dept. of City of Chicago v. Mosely,
408 U.S. 92 (1972) 12

Poulos v. New Hampshire, 345 U.S. 395 (1953) 13

Reitman v. Mulkey, 387 U.S. 369 (1967) 20

Sherbert v. Verner, 374 U.S. 398 (1963) 18,19

Thomas v. Review Bd. of Indiana Employment
Security Division, 101 S.Ct. 1425 (1981) 19,20

Tilton v. Richardson, 403 U.S. 672 (1971) xi,24

Tucker v. Texas, 326 U.S. 517 (1946) 13

United Transportation Union v. Michigan, 401 U.S. 576 (1971) 14

Village of Schaumburg v. Citizens for a Better Environment 444 U.S. 620 (1980) 11

Walz v. Tax Commission, 397 U.S. 664 (1970) 1,6,18,19

Wisconsin v. Yoder, 406 U.S. 205 (1972) 18,19

Zorach v. Clauson, 343 U.S. 306 (1952) 6,27

Statutes cited:

Family Educational Rights and Privacy Act (Buckley Amendment) Pub. L. 93-380, 88 Stat. 571 8

Higher Education Facilities Act of 1963, Pub. L. 88-204, 77 Stat. 363 24

Regulations cited:

45 C.F.R. § 100a et seq. 24

45 C.F.R. § 170 24

Books and periodicals cited:

Anonymous, "New England's First Fruits" (1643), *Collections, Mass. Hist. Society* (1792) 2

Chester Antieau, Arthur Downey, and Edward Roberts, *Freedom from Federal Establishment* (1964) 17

Association for the Coordination of University Religious Affairs (ACURA), *Proposed Standards for Religious Programs* (1981) 22

Richard Baepler and Arthur Olsen, eds., *The Church-Related College in an Age of Pluralism* (1977) 25

William Beaney and Edward Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process," 13 J. Pub. L. 475 (1964) 26

Walter Berns, *The First Amendment and the Future of American Democracy* (1976) 17

R. Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision," 10 Midwest J. of Poli. Sci. 304 (1966) 26

William Blakely, ed., *American State Papers Bearing on Sunday Legislation* (1911) 17

Edgar Carlson, *The Future of Church-Related Higher Education* (1977) 25

Jesse Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980) 20

Lawrence A. Cremin, *American Education: The Colonial Experience, 1607-1783* (1970) 2

Christopher Dawson, *The Crisis of Western Education* (1961) 2

Kenneth Dolbeare and Philip Hammond, *The School Prayer Decisions* (1971) 26

Thomas Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974) 14

David Everson, ed., *The Supreme Court as Policy Maker* (1968) 26

Nancy Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U.L. Rev. 207 (1978) 20

Ben Fisher, ed., *New Pathways: A Dialogue in Christian Higher Education* (1980) 25

P. Ford, ed., *The Works of Thomas Jefferson* (1905 ff.) ... 3,4

Edward Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation" (1980) 14

Edward Gaffney and Philip Moots, *The Government and the Campus* (1981) 23,24

Donald Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development," 80 Harv. L. Rev. 1381 (1967) 20

Joel Hansen, "Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor," 1978 Brigham Young U.L. Rev. 645 3,4

Charles Homer Haskins, *The Rise of Universities* (1957) 2

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 89th Cong. 2d Sess. (1966) 27,28

Gaillard Hunt, ed., *Writings of James Madison* (1909) 17

Richard Johnson, *The Dynamics of Compliance* (1967) 26

Ellis Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963) 26

Paul Kauper, "Church and State: Cooperative Separation," 60 Mich. L. Rev. 1 (1961) 22

Paul Kauper, *Legal and Other Critical Issues of Religion in Public Higher Education* (1958) 22

Adrienne Koch and William Peden, *The Life and Selected Writings of Thomas Jefferson* (1944) 15

Paul Limbert, *Denominational Policies in the Support of Higher Education* (1929) 5

Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978) 16

Philip Moots and Edward Gaffney, *Church and Campus* (1979) 23

Samuel Eliot Morison, *The Founding of Harvard College* (1935) 2

John Mosely, ed., *Church and College: A Vital Partnership* (1980) 14,25

William Muir, *Prayer in the Public Schools* (1967) 26

National Center for Education Statistics, *The Condition of Education* (1980) 6

National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976) 25

John Henry Newman, *The Idea of a University* (Image Book ed. 1959) 25

Robert Rue Parsonage, ed., *Church Related Higher Education* (1978) 2,25

M. Pattillo and D. Mackenzie, *Church-Sponsored Higher Education in the United States* (1966) 2

Leo Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973) 20

Reena Raggi, "An Independent Right to Freedom of Association," 12 Harv. Civ. Rts. — Civ. Lib. L. Rev. 1 (1977) 14

George N. Rainsford, *Congress and Higher Education in the Nineteenth Century* (1972) 5

J. Randolph, ed., *Early History of the University of Virginia as Contained in the Letters of Thomas Jefferson and Joseph C. Cabell* (1856) 3,4

Charles Rice, "The Constitutional Right of Association," 16 Hastings L.J. 491 (1965) 14

Charles Rice, *Freedom of Association* (1962) 14

George P. Schmidt, *The Liberal Arts College: A Chapter in American Cultural History* (1957) 5

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 17

Alexis de Tocqueville, *Democracy in America* (P. Bradley ed. 1945) 13

Robert Toms and John Whitehead, "The Religious Student in Public Education: Resolving a Constitutional Dilemma," 27 Emory L.J. 3 (1978) 27

Laurence A. Tribe, *American Constitution Law* (1978) and 1979 supplement 13,20,27

Erich A. Walter, ed., *Religion and the State University* (1958) 2

John Westerhoff, ed., *The Church's Ministry in Higher Education* (1978) 25

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher education, especially church-related colleges or universities. The Advisory Board of this Center is composed of public officials, executives of denominations and religious bodies engaged in education, college administrators, and attorneys knowledgeable in education law. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

The National Council of Churches of Christ in the United States of America is the cooperative agency of 32 national Protestant and Eastern Orthodox religious denominations, with an aggregate membership of over 40 million people. The National Council of Churches of Christ is organized exclusively for religious purposes, and it is committed to promoting the application of the law of Christ in every sphere of human relations, including education.

The National Institute for Campus Ministries is an independent interfaith body supporting the ministries of Jews and Christians in higher education through research programs, publications, and programs of continuing education for campus ministers.

United Ministries in Education is a covenant-based ministry created by the national agencies of eight Protestant Churches: American Baptist Churches, Church of the Brethren, Christian Church (Disciples of Christ), the Episcopal Church, the Moravian Church in America, the Presbyterian Church in the United

States, United Church of Christ, and United Presbyterian Church in the U.S.A. This ministry is focused upon services to persons engaged in education as students, teachers, administrators and board members in schools K-12, higher education, and community education.

The Center for Constitutional Studies has conducted a nationwide survey in 1981 of Jewish, Protestant, and Roman Catholic campus ministers serving at public institutions of higher education and is in a position to report to this Court facts concerning the access or denial of access of those ministers to the campuses of state universities similar to the University of Missouri in the instant case. This survey was conducted with the cooperation of the National Institute for Campus Ministry and United Ministries in Education. The work of campus ministers at state campuses will undoubtedly be significantly impacted by the decision of this Court in the instant case, but the interests of these amici cannot reasonably be expected to be articulated or defended by the parties in this case.

In 1978 the Center for Constitutional Studies also conducted a nationwide survey of the presidents of all church-related colleges and universities in this country. Amici are in a position to report to this Court facts concerning the interpretation that various federal officials have placed upon this Court's historical rulings in *Engel v. Vitale,* 370 U.S. 421 (1962) and *Abington School District v. Schempp,* 374 U.S. 203 (1963), as these officials discharge their obligation to implement the federal regulations governing the use of facilities constructed in whole or in part with the financial assistance sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971). As amici argue in the attached brief, they will undoubtedly be affected by the outcome of the instant litigation, but none of the amici can reasonably expect that their interests will be articulated or defended by the parties in this case.

Amici have tried to obtain consent of both parties to participate in this case. The respondent has granted such consent, but the petitioner is not willing to do so. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amicus curiae in support of affirming the judgment of the Court of Appeals.

BRIEF AMICUS CURIAE

I. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, CONSTITUTIONAL RIGHTS OF STUDENTS ATTENDING PUBLIC INSTITUTIONS OF HIGHER EDUCATION, AND OF CAMPUS MINISTERS SERVING THOSE STUDENTS, WILL BE IMPERMISSIBLY BURDENED.

A. THE GROWTH OF THE STATE'S ROLE IN AMERICAN HIGHER EDUCATION REQUIRES THE STATES TO BE SENSITIVE TO A BROAD SPECTRUM OF HUMAN VALUES, INCLUDING RELIGIOUS VALUES THAT ARE VOLUNTARILY CHOSEN, WHENEVER THE STATES ATTEMPT TO REGULATE AND CONTROL THE EDUCATIONAL EXPERIENCE.

This Court has, on occasion, found it useful to explore the historical background of issues presented to it. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 622-25 (1978) (Opinion of Burger, C. J.); *Walz v. Tax Commission*, 397 U.S. 664, at 668 (1970) (Opinion of the Court per Burger, C. J.), and at 681-87 (Brennan, J., concurring); *Abington School District v. Schempp*, 374 U.S. 203, 232-42 (1963) (Brennan, J., concurring). While recognizing that "an awareness of history . . . do[es] not always resolve concrete problems," *Schempp, supra*, at 234 (Brennan, J., concurring), amici suggest that the history of American higher education provides helpful background for understanding the issues presented in this case. During the earliest colonial period, higher education was sponsored exclusively by religious groups. For example, the first American college, Harvard, founded in 1636, was patterned after Emmanuel College at Cambridge University. The Harvard mottoes were "Christo et

ecclesiae" ("For Christ and the Church") and "In Christi Gloriam" ("Unto the Glory of Christ"), and its curriculum combined a classical liberal arts education[1] with instruction in the Christian religion. See S. Morison, *The Founding of Harvard College* (1935). A famous pamphlet published in 1643 describing the purposes of America's first college clearly included religious formation among the objects of higher education. See "New England's First Fruits" (1643), *Collections, Mass. Hist. Society* (1792) vol. I, pp. 242-48, reprinted in *The Annals of America* (1968) vol. I, pp. 175-79. This statement of purpose and description of Harvard's curriculum is likewise descriptive of the religious motivation of the other colonial institutions founded after Harvard, including Brown, Columbia, Dartmouth, Pennsylvania, Princeton, Rutgers, Washington and Lee, William and Mary, and Yale, all of which were "strongly religious in tone and curriculum, although not all were sponsored by individual denominations."[2]

It is significant that the earliest state universities differed very little in this respect from the colleges founded in colonial times by religious denominations. See W. Bean "What is the State University?" in E. Walter, ed., *Religion and the State University* 60-61 (1958). For example, one of the most eminent presidents of a prestigious state university, Thomas Jefferson, planned to include religious teachings in the University of Virginia's curri-

---

[1]For a discussion of the essential components of liberal education in the West for the past fifteen centuries, see C. Dawson, *The Crisis of Western Education* (1961), and C. Haskins, *The Rise of Universities* (1957).

[2]M. Pattillo and D. Mackenzie, *Church-Sponsored Higher Education in the United States* 3 (1966); see also L. Cremin, *American Education: The Colonial Experience, 1607-1783* (1970), and J. Smylie, "Roads to Our Present," in R. Parsonage, ed., *Church Related Higher Education* 135-75 (1978).

culum in a way calculated to encourage morality and a belief in God but not to foster a preferential establishment of one sect's beliefs over another's. See J. Randolph, ed., *Early History of the University of Virginia as Contained in the Letters of Thomas Jefferson and Joseph C. Cabell* 441 (1856), as cited in Hansen, "Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor", 1978 Brigham Young U. L. Rev. 645, 670. In 1822 Jefferson repudiated as a "calumny" the suggestion that the University of Virginia was "an institution, not merely of no [particular] religion, but against all religions." Letter from Jefferson to Thomas Cooper, November 2, 1822, reprinted in P. Ford, ed., 12 *The Works of Thomas Jefferson* 272 (1905). In the same year Jefferson put forward a plan for incorporating religious studies and religious worship in the life of the campus. In this plan Jefferson wrote:

> It was not, however, to be understood that instruction in religious opinions and duties was meant to be precluded by the public authorities as indifferent to the interests of society; on the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University. . . .

J. Randolph, ed., *Early History of the University of Virginia* 474, as cited in Hansen, "Jefferson and the Church-State Wall", 1978 Brigham Young U. L. Rev. 670-71. Jefferson thought that the inclusion of what we would now call religious studies programs and campus ministry programs within the confines of the university would be beneficial not only to theological students training for the ministry but also for the full-time student body:

> Such establishments would offer the further and great advantage of enabling students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under *impartial regulations* . . . or in the lecturing room of such professor. *Ibid.* (emphasis supplied).

In the letter to Dr. Cooper mentioned above, Jefferson wrote of this plan as follows:

> In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of *encouraging the different religious sects* to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and *every other accomodation we can give them;* preserving, however, their independence of us and of each other. . . . And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason and morality.

Jefferson to Cooper, November 2, 1822, reprinted in P. Ford,

ed., 12 *The Works of Thomas Jefferson* 272 (1905) (emphasis supplied).

Throughout the nineteenth century and for a variety of reasons, several of the institutions of higher education that originally had been created and supported by religious denominations weakened or severed their ties to the religious groups with which they previously had been affiliated. This gradual and sometimes imperceptible shift from church-related to independent private status did not, however, necessarily imply a lessening of concern for religious instruction in the college curriculum. For example, in 1855 David Walker, the President of Harvard, maintained that the college should not be equated simply with the church, but that a distinction had to be drawn between "Christianity considered as a means of enlightening and civilizing men in their relations to each other and the world, and Christianity considered as a means of eternal salvation to individuals." The former was in Walker's view appropriate as a discipline for study in the university, but the latter was to be reserved for the mission of the church. See G. Schmidt, *The Liberal Arts College: A Chapter in American Cultural History* 39 (1957), and P. Limbert, *Denominational Policies in the Support and Supervision of Higher Education* 11 (1929).

With the establishment of the land-grant colleges as a result of the Morrill Acts, the states in the latter decades of the nineteenth centuries began the progress of expansion of public facilities providing higher education. See G. Rainsford, *Congress and Higher Education in the Nineteenth Century* (1972). This pattern of growth has now reached the point that in academic year 1978-1979 state colleges and universities enrolled nearly 78% of all students engaged in higher education. According to the projections of the National Center for Education Statistics in the U.S. Department of Education, this ratio of better than three

to one in the student enrollment in public institutions over that in private institutions is expected to increase, but only slightly, over the next decade. See *The Condition of Education (1980)*.

Amici urge that the history of American higher education which culminates in the numerical predominance of the public sector should not mean that voluntary participation in religious studies and religious worship should be excluded by state regulation from all publicly supported institutions of higher education. To the contrary, precisely because the states have undertaken the task of providing higher education for the vast majority of Americans who go on to college, amici suggest that the states have an affirmative obligation, at the minimum, to be sensitive to the legitimate religious needs of students and faculty members on public campuses. See *Schempp, supra*, at 296-99 (Brennan, J., concurring). To say otherwise is to ignore the wisdom of fifteen centuries of the understanding of a liberal education in the West, which has always included the study of religion. To be sure, the no-establishment principle prohibits the states from coercing obedience to any religious beliefs and from fostering one particular religious group and its teachings or observances over another. See *Walz, supra*, at 694-97 (Harlan, J., concurring). As this Court has repeatedly observed, however, the no-establishment principle is not to be translated into an attitude of official hostility toward religion, but into one of "benevolent neutrality," accommodating religious interests whenever that is possible. See, e.g., *Walz, supra*, at 669; *Schempp, supra*, at 222, 225; and *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

In the spring of 1981, the Center for Constitutional Studies conducted a nationwide survey of campus ministers at state colleges and universities. The focus of the study was on the access or denial of access to public campuses experienced by

these ministers.[3] The survey instrument was mailed to all campus ministers serving state institutions who are listed in the directory of amicus United Ministries in Education. Since this group is primarily composed of mainstream Protestant ministers, the survey instrument was also sent to all Hillel directors at state campuses, and to twenty-seven Roman Catholic diocesan directors of campus ministry. Of the 325 to whom the survey was sent, 189 participated in the study. The denominational or religious affiliation of the respondents included the following: African Methodist Episcopal Zion, Assembly of God, American Baptist, Brethren, Disciples, Episcopal, Jewish, Lutheran, Presbyterian Church in the U.S., Reformed Church, Roman Catholic, Southern Baptist, United Church of Christ, United Methodist Church, and United Presbyterian Church in the U.S.A.

Forty-three of the respondents (23.8%) indicated that state regulations governing use of campus facilities had restricted their access to students desiring their ministry. Several Roman Catholic respondents complained that rules prohibiting all forms of religious services, including Bible study, impose a significant hardship on religious believers with a strong liturgical tradition because the state cannot easily identify a small group of persons gathering for purposes of studying the Bible but can readily identify and prohibit larger meetings of persons gathering for more obviously visible religious ceremonies. Protestant campus ministers complained that they are not allowed to share a meal

---

[3]A copy of the survey instrument has been mailed to the parties in this litigation and is available upon request to the Librarian of the Supreme Court and to other interested persons. Because of the professional requirements of confidentiality governing studies of this nature, our findings are reported only in a statistical form, but the responses stripped of any individually identifiable characteristics are likewise available upon request to the Center for Constitutional Studies.

on a paying basis with students in a cafeteria, to rent facilities on campus for purposes of conducting seminars on the Reformation, nor even in some instances to publicize their off-campus activities. A rabbi with 30 years experience in Hillel work, 29 of them at a state campus, complained of the difficulty of reaching Jewish students unless he has access to voluntarily stated religious preference information; such information has been routinely provided at one large state university, but is denied to campus ministers at other campuses within the same state system. A Methodist minister similarly complained that the construction of the Buckley Amendment, 20 U.S.C. § 1232g, by university counsel at one state university has resulted in a similar denial of access to voluntarily stated information concerning denominational preference.

The state regulations that the petitioner asks this Court to sustain are broad and sweeping. They have the effect of banning religious worship and religious instruction on state campuses even though such gatherings would occur at no expense to the state (the respondent students were denied access to the university lawn for purposes of conducting their meeting, Petition for Writ of Certiorari, A-6). Amici fear that the federalization of such sweeping state regulations could significantly affect the ability of campus ministers to carry out their work of counselling, religious instruction, and leading worship at state institutions. This fear is grounded in the responses of the 189 campus ministers participating in this study to questions concerning the appropriateness or desirability of regulations such as those at issue in the instant case. When asked about state regulation that would bar any use of a university building or of the university grounds for *religious worship*, only 11 persons (5.8%) indicated that they strongly agreed that such a regulation is appropriate or desirable; another 11 (5.8%) agreed; 76 (40.2%) disagreed and 90 (47.6%) strongly dis-

agreed; 1 person (.5%) expressed no opinion on this matter. The combined total of agreement with such regulations was 11.6% of the population; disagreement or strong disagreement was reflected by 87.6%.

Even fewer respondents thought it is appropriate or desirable for a state to prohibit the use of university buildings or of the grounds for the purpose of the *study of religion,* as for example, with a Bible study group, a seminar on Calvin or Luther, or classes on Talmudic interpretation. Only 4 (2.1%) of the respondents strongly agreed that a regulation of this sort was appropriate or desirable; 8 (4.2%) agreed; 60 (31.7%) disagreed; and 115 (60.9%) strongly disagreed that such a regulation was either appropriate or desirable; 2 persons (1%) expressed no opinion in this matter. The combined totals of agreement with state regulation prohibiting the use of public facilities at a state university for religious study was 6.3%; disagreement with such regulation was reflected by 92.6%.

Participants in this study were aware of the potential danger of a governmental establishment of religion that might arise where, unlike the instant case, the state were to subsidize a particular religious group in a significant way. But as one rabbi put it, "Too often the phrase 'separation of church and state' is used as a euphemism to mean 'Get lost, Charlie.' The University community still has a long way to go to learn that separation of church and state means no entanglement — one cannot and should not control the other." There was likewise a sensitivity to the central value of voluntarism protected by the no-establishment principle. A Methodist campus minister, for example, stated: "Students should be free to study and practice religion, but they should be free from coercion in dormitories by any political or religious groups." A Presbyterian minister with 25 years experience on state campuses wrote: "For the state to support or favor one particular religion in contradistinction to

others would be wrong. For sectarian religious teaching to be required would be wrong. . . . However, students should be free to associate and to exercise their religion. . . . Also, the Church should be free to express its critique of any aspect of the university on the government."

Survey respondents were opposed to regulation of communication based on the content of the communication. An Episcopal minister wrote: "A wisely and fairly administered policy treating religious exercise in much the same way as political rallies . . . or fraternal organizations . . . would be in the best interests of all: no special favors, no special prohibitions." But the survey participants were sensitive to the legitimacy of the governmental interest in reasonable regulation of the time, place, and manner of speech. As another rabbi put it, "I believe that every campus should provide a place for worship and religious study, but not that every place on campus should be available for worship."

In short, the campus ministers who participated in this survey reflected sophisticated awareness of and respect for constitutional values, including the protection of minorities. Hence their response to a question directly concerning the instant case cannot be dismissed as merely self-serving or uninformed. One hundred and forty-five (76.7%) of the survey respondents expressed strong agreement with the view that "In deciding the *Widmar* case, the Supreme Court should take into account not only the potential danger of a governmental establishment of religion prohibited by the First Amendment, but also the necessity of accommodating the legitimate interests of college students to free exercise of religion protected by that Amendment"; 41 (21.7%) expressed agreement with this view; two (1%) expressed disagreement; and one (.5%) expressed strong disagreement. This represents virtual unanimity (98.4%) on

this matter among Jewish, Protestant, and Catholic campus ministers at state universities.

Amici report this statistical information to this Court not to suggest that complex constitutional adjudication can be resolved solely by resort to opinion polls, but to assist this Court in understanding the damaging impact that a reversal of the judgment of the Court of Appeals could have on the legitimate work of campus ministers of all faiths at state colleges and universities. Now that public institutions have become the wholesalers of higher education, amici urge that the very growth of the state's role in American higher education requires the states to be sensitive to a broad spectrum of human values, including voluntarily chosen religious values, whenever the states attempt to regulate and control the educational experience. In other words, public colleges and universities have special responsibilities toward safeguarding the vitality of First Amendment freedoms for the vast majority of our population that goes on to college.

B. THE REGULATIONS IN THE INSTANT CASE HAVE THE EFFECT OF REGULATING SPEECH AND ASSOCIATIONAL RIGHTS ON THE IMPERMISSIBLE BASIS OF THE RELIGIOUS CONTENT OF COMMUNICATION AND ASSOCIATION.

As the Court of Appeals correctly observed in the instant case, religious speech is no less protected by the First Amendment than other speech. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296

(1940). Similarly, the freedom to associate for the advancement of religious beliefs is no less protected by the First Amendment than the freedom to associate for the advancement of beliefs that are political, economic or cultural in nature. See *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring); *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958). The regulations that the petitioner asks this Court to sustain militate against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely,* 408 U.S. 92, 95-96 (1972).

As recently as last year this Court had occasion to reiterate its teaching in *Mosely* and to recast it in terms of Equal Protection analysis, mandating that "when government regulation discriminates among speech-related activities in a public forum, . . . the legislation must be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown,* 447 U.S. 455, 461-62 (1980). As amici argue in the following portion of this brief, the state interest asserted here by the petitioner relating to the potential danger of a governmental establishment of religion is premised on a misunderstanding of the no-establishment principle. This misunderstanding cannot stand as the "substantial state interest" required by the teaching of this Court on Equal Protection analysis, see, e.g., *Craig v. Boren,* 429 U.S. 190 (1976), nor can the regulations promulgated by the University of Missouri withstand the careful scrutiny required under such circumstances. When, as here, a state university makes its campus facilities available to various student organizations that it has no desire to support or to endorse, *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S.

981 (1978), it cannot be heard to offer as its justification for discriminating against student groups voluntarily organized for religious purposes that to allow equal access to campus facilities for religious organizations would constitute official support or endorsement of that religious perspective. Hence, when the government denies such access only to a voluntary association wishing to use the facility to engage in religious speech, the government has created a content-based restraint which unduly burdens the expression and communication of ideas. See L. Tribe, *American Constitutional Law* 580-582 (1978). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law*, 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). See also *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 334 U.S. 558 (1948), and *Tucker v. Texas*, 326 U.S. 517 (1946).

The Court of Appeals noted that the regulations at issue here impose a significant burden on the students' freedom of association. The desire to gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed.

1945).[4]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, there is no principled way of distinguishing between the respondents here and other groups to which this Court has explicitly extended the protection of freedom of association in its prior decisions dealing with this freedom, including civil rights groups, *NAACP v. Alabama,* 357 U.S. 449 (1958), political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). To fail to extend to the student respondents in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James,* 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib. v. University of Missouri, supra,* would run counter to the notion that the rights of religious associations should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring). And among these rights should be equal access to public facilities on a neutral and non-discriminatory basis.

The recent expansion by this Court of the doctrine of

---

[4]See Raggi, "An Independent Right to Freedom of Association," 12 Harv. Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

corporate free speech, see e.g., *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530 (1980), *Central Hudson Gas Co. v. Public Service Comm'n.* 447 U.S. 557 (1980), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978), suggests, moreover, that if the free speech rights of for-profit corporations merit constitutional protection against legislative enactments seeking to regulate such speech, the free speech rights of not-for-profit corporations similar to voluntary associations like the respondent in the instant case likewise merits constitutional support.

C. THE REGULATIONS IN THE INSTANT CASE ARE NOT REQUIRED BY THE HISTORICAL INTENT OF THE NO-ESTABLISHMENT CLAUSE, NOR BY SUBSEQUENT INTERPRETATIONS OF THE MEANING OF THAT CLAUSE BY THIS COURT, NOR BY CONTEMPORARY PRACTICE IN MANY PUBLIC INSTITUTIONS OF HIGHER EDUCATION

As was suggested above, from the founding of Harvard in 1636, religion has occupied a significant role in American higher education, whether the campus was related to a church, independent of both a church body and the state, or supported and operated by the state. The actual practice of Thomas Jefferson as President of the University of Virginia suggests that for this founding father, at least, there was no irreconcilable conflict between the no-establishment principle to which Jefferson was firmly committed, see, e.g., Letter to Danbury Baptists, January 1, 1802, as cited in A. Koch and W. Peden, *The Life and Selected Writings of Thomas Jefferson* 332 (1944), and the reasonable accommodation of religious worship and religious instruction on state campuses.

A simplistic reading of the intent of the Establishment Clause

should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or for denigrating a free exercise claim because of a highly dubious conjecture that accommodation of that interest would impermissibly establish a religion.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those impliedly argued here by the petitioner. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of*

Congress 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the respondents. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In this view, the religion clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964); see also Walter Berns, *The First Amendment and the Future of American Democracy*

(1976). By affirming the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

Subsequent interpretation of the meaning of the religion clauses of the First Amendment has not absolutized either of those clauses. To the contrary, this Court has repeatedly tried to preserve not simply a delicate balance, but a healthy, creative tension between these clauses. For example, this Court has suggested that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission, supra,* at 669.

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner,* 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education,* 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson,* however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment principle would always be the dominant concern.

Some courts, including the District Court in the instant case, apparently assume that reasonable accommodations of religious beliefs and practices constitute an impermissible establishment of religion. See, e.g. *Brandon v. Bd. of Ed.*, 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division*, 391 N.E. 2d 1127 (Ind. 1979), rev'd., 101 S. Ct. 1425 (1981). But to indulge this assumption is to take an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, and to reduce the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). See also *Sherbert*, supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief"). To turn aside the free exercise claim presented by the respondents on the basis of the conjecture or the worry that their praying together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert*, *Yoder*, and recently confirmed by this Court in *Thomas*.

It must be stressed that the respondents are not infants, but are mature students. They are of sufficient maturity to register to vote, and, if it were necessary, to serve in the armed forces; see *Healy v. James*, 408 U.S. 169, 197 (Douglas, J., concurring), and *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir.), application for injunction denied, 444 U.S. 890 (1979). It is a gross misunderstanding of the level of their maturity to treat them in a paternalistic fashion as though they were infants incapable of any intelligent, truly voluntary decision-making.

Nothing in the prior decisions of this Court justifies the view of the petitioner that the government must allow on public campuses sundry forms of political speech, but may ban from a public campus the voluntarily meeting of mature students for purposes of engaging in speech the content of which is religious. For "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By affirming the judgment of the Court of Appeals, this Court could reaffirm its teaching concerning the importance of free exercise values in cases of potential conflict with no-establishment principle.[5]

The view of the petitioner that any accommodation of the religious interests of students or faculty members at the University of Missouri would offend against that state's constitution, moreover, overlooks the fact that after the enactment of the Fourteenth Amendment, no state may, consistently with the liberty aspect of the Due Process Clause, unduly burden the rights of any person to the free exercise of religion, free speech, and freedom of association. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); and see Black, "The Supreme Court, 1966 Term; Foreword: "State Action," Equal Protection, and California's Proposition 14," 81 Harv. L. Rev. 69 (1967). Nor may any

---

[5]See, e.g., *Thomas v. Review Bd. of Indiana Employment Security Division*, 101 S. Ct. 1425 (1981); *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).